

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.2.2007

CORAM

THE HON'BLE MR.JUSTICE S.ASHOK KUMAR

Transfer C.M.P.No. 311 of 2006

and

M.P.No.1 of 2006

Mrs. Sunita
rep. by her Power Agent
and father Mr.T.S.Srinivasan Petitioner

Vs.

S.Krishnan Respondent

Transfer CMP filed to withdraw and transfer the
OP.No.1939/2006 pending on the file of the Family Court, Chennai,
to be tried and heard along with Marriage Petition No.230 of 2006
on the file of the Civil Judge, Junior Division, Pune.

For Petitioner : Mr.V.Raghavachari

For Respondents : Mr.Sathish Rajan

ORDER

This Transfer CMP has been filed to withdraw the O.P.No.1939
of 2006 pending on the file of the Family Court, Chennai, and
transfer the same to be tried and heard along with the marriage
Petition No:230 of 2006 on the file of the Civil Judge Junior
Division, Pune.

2. The father of the petitioner who is also the power agent
has sworn to an affidavit stating that the petitioner was given in
marriage to the respondent on 16.5.1994 as per Hindu Customary
rites with sridharna both cash and gold and silver articles. After
marriage the couples lived at Bangalore. From the date of marriage
the petitioner was not treated properly for no reason. The
respondent even prevented her from continuing her studies. Later
the respondent and his relatives humiliated the petitioner in the
presence of others for not giving birth to a child. The parties
consulted a physician. The tests revealed that the respondent is
impotent. Despite that, the respondent used to abuse and treat the
petitioner cruelly. The family members and the respondent are

keen in taking the earnings of the petitioner and they resisted the proposal to adopt a child. Being left with no other alternative, the petitioner issued an Advocate Notice on 1.6.2006 calling upon the respondent to give his consent for a divorce by mutual consent. But there was no reply and did not change his behaviour. Therefore the petitioner filed a petition for divorce under Section 13(1) (1a) and 13(1)(1b) of the Hindu Marriage Act in Marriage Petition No.230 of 2006 before the Civil Judge at Pune. In the said case summons were duly served on the respondent and he also engaged an Advocate at Pune. But as a counterblast he filed a petition under Section 9 of the said Act in O.P.No.1939 of 2006 before the Family Court at Chennai.

3. It is also averred that the petitioner is residing at Pimpri, Pune and the respondent is a resident of Bangalore. Therefore, it will be difficult for the petitioner to travel all along from Pune to Chennai for every hearing. As on today the petitioner is employed abroad. The proceedings initiated at Pune Court is earlier to the proceedings initiated by the respondent at Chennai. If the case is to continue at Chennai the petitioner will be forced to travel from Pune to Chennai, when she is in India. Therefore, in the interest of justice, the O.P.proceedings filed by the respondent under Section 9 of the Hindu Marriage Act is to be transferred to the file of the Civil Judge Junior Division, Pune and heard along with the Marriage Petition filed by the petitioner.

4. In support of the above averments, the learned counsel appearing for the petitioner also relied on the decision of the Andhra Pradesh High Court in Mamta Gupta V.Mukund Kumar Gupta reported in AIR 2000 AP. 394 wherein it has been held that the High Courts are empowered by Section 23(3) CPC to transfer a case and it is for the party seeking transfer either to choose the forum under Section 25 or 25 depending upon his social, economic status. But, to say that the party has to file an application only before the Supreme Court under Section 25, would amount to emasculating Section 23(3). Both the provisions are independent and option is left to the party approaching the court for transfer. Therefore, Section 25 did not overlap Section 23(3) CPC.

5. In 2003 AIHC 2876, (Vempati Sarada Vs.Vempati Kaladhar), another learned Judge of the Andhra Pradesh reiterated the same position and held thus:-

"11. A reading of both the provisions will clearly go to show that these provisions are independent provisions and absolutely there is no conflict between these two provisions. Merely because the High Court is empowered to order transfer of a proceeding pending before a Subordinate Court within its jurisdiction to another Court Subordinate to another High court, it may not come in the way of the powers which may be exercised by the Supreme Court

under Section 25 of the Code. Hence, by a close reading of both provisions aforesaid, I am of the considered opinion that the power under Section 23(3) of the Code can be definitely exercised by this Court and the same is not in any way curtailed by Section 25 of the Code. In fact, I am well supported in this regard by the view expressed by this Court in Mamta Gupta's case. Hence, in view of the same, I am of the considered opinion that such power can be exercised by invoking Section 23(3) of the Code. Further, taking into consideration the nature of allegations made in the affidavit filed in support of the Transfer CMP and also the allegations made in the counter affidavit filed by the respondent/husband, I am also of the opinion that in view of the facts which had been explained by the petitioner/wife definitely she is entitled to the relief as prayed for in the present transfer CMP."

6. In an identical case, where the wife filed a petition under Section 13 before the Bombay City Civil Court and later the husband filed a petition under Section 13 before the Family Court at Jaipur, the Rajasthan High Court (Jaipur Bench) held as follows (Sunita bali Vs. Ashok Bali (AIR 1987 Rajasthan 79)):-

"The divorce petition filed by the husband in the Family Court at Jaipur could be transferred under Section 21-, to the matrimonial court at Bombay, where the earlier Petition of the wife was presented, notwithstanding that the procedure for disposal of Petition is followed by the Family Courts under the Family Courts Act, 1984 was substantially different from the procedure followed by other matrimonial courts. The power of transfer could be exercised in the circumstances provided under Section 21-A Hindu Marriage Act, 1955, and such powers were not subject to the procedure to be adopted by the different matrimonial courts. The power to transfer Petition in such circumstances, enumerated in S.21-A could not be whittled down because the two matrimonial courts were required to dispose of the matter by adopting different procedures. S.21-A, Hindu Marriage Act, required that the later Petition should be transferred to the District Court in which the earlier petition was presented and both the petitions had to be heard and disposed of together by the District Court in which the earlier Petition was presented. Since the earlier petition in the instant case was presented to the District Court at Bombay, the later Petition filed in the Family Court at Jaipur had to be transferred to the District Court at Bombay, and the power to transfer such Petition vested, by virtue of Section 23 (3), CPC in the Jaipur High Court to which the Family

Court at Jaipur was subordinate. Sub Section (3), S.23, Civil P.C., laid down that where the civil Courts were subordinate to different High Courts, the application had to be made to the High Court within the local limits of whose jurisdiction the court in which the suit was brought was situate. In the instant case, the Bombay City Civil Court where the earlier Petition was presented, was subordinate to the Bombay High Court and the Family Court at Jaipur, where the later petition was filed, was subordinate to the Jaipur High Court. Therefore, as the civil courts, where the petitions were presented, were subordinate to different High Courts, and the later Petition had to be presented to the District Court in which the earlier petition was presented, the power of transfer lay in the Jaipur High Court, within whose jurisdiction the District Court in which the later petition was presented was situate."

7. From the above judgments it is clear that the proposition of law has been well settled that this is the competent Court having jurisdiction under Section 23(3) CPC to entertain this Transfer CMP as it is for the party seeking transfer either to choose the form under Section 23(3) or 25 and further as per Section 23(3) CPC, where such courts before which two matrimonial cases pending are subordinate to different High Courts, the application shall be made for transfer to the High Court within the local limits of whose jurisdiction to Court in which the suit is brought is situate. Further, considering the facts and circumstances of the case, particularly the fact that the petition filed at Pune by the petitioner/wife is earlier in point of time and also taking into consideration of the allegations made by the petitioner, I am of the considered view that the O.P.No.1939 of 2006 instituted by the respondent/husband is to be withdrawn and transferred to the file of the Civil Judge Junior Division at Pune to be heard together along with M.P.No:230 of 2006.

8. In the result, this Transfer CMP is allowed with a direction to withdraw and transfer the O.P.No.1939/2006 pending on the file of the Family Court, Chennai, to be tried and heard along with Marriage Petition No.230 of 2006 on the file of the Civil Judge, Junior Division, Pune. Consequently connected CMP is closed. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

Copy to:

1. The Presiding Officer,
Family Court, Chennai.

2. The Civil Judge (Junior Division)
Pune.

1 cc to Mr.V.Raghavachari, Advocate, Sr. 9778

1 cc to Mr.S.Sathish Rajan, Advocate, sr. 9602

Tr.C.M.P. No. 311 of 2006

TEJ (CO)
kk 23/2



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